Filed 6/22/09 In re T.P. CA1/3

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

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| In re T.P., a Person Coming Under the Juvenile Court Law. | |
| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>T.P.,<br>Defendant and Appellant. | A123600<br><br>(Solano County<br>Super. Ct. No. J38465) |

Sixteen-year-old T.P. (appellant) appeals from an order of the juvenile court placing him on probation. He contends there was insufficient evidence to support the juvenile court's finding that he committed burglary. We reject the contention and affirm the order.

## I. FACTUAL AND PROCEDURAL BACKGROUND

On May 6, 2008, a petition was filed charging appellant with attempted arson (Penal Code,[1] §§ 664, 451, subd. (d), count 1), possession of flammable material (§ 453, subd. (a), count 2) and burglary (§ 459, count 3). The juvenile court subsequently dismissed count 2 on the prosecutor's motion.

At a contested jurisdiction hearing, Richard Watrous testified he teaches "shop" at a middle school. When he went to his classroom on Monday, March 10, 2008, he noticed that a window by the roof of the building was broken and partially open. He also noticed

[1] All further statutory references are to the Penal Code.

that the motor on the forge, which his class uses to heat and shape metal, was running and that there was a carbon dioxide bottle inside the forge. He testified he had been the last to leave the classroom the previous Friday and that at the time he left, the window was not broken and the forge was not running. He had not given anyone permission to go inside his classroom over the weekend and that for safety reasons, students are never allowed in the room unless he is also there.

Watrous testified that the push of a button turns the forge's motor on, "then . . . after a few seconds the gas comes on and then there's a lighter that ignites the gas and then it catches on fire and there's a fire." He testified that the forge generates at least 1,500 degrees of heat. His students were familiar with the way the forge worked. Watrous explained there was no fire even though the motor was running that day because the forge was a "relatively new forge" ("only about a year old") that the school "had to get because of the new laws for safety for students," and had a safety feature that does not allow the forge to "fire up" when there is an object inside. When asked what would have happened had there not been a safety feature, Watrous responded: "Well, it would have, depending on how much pressure was in the tank and what was in the tank . . . it would have probably blown the top off of that piece off. . . . It would have probably blown that off. I don't know if it would have sent sparks or things flying, it would have caught things on fire or not. I have no clue what it would have done exactly. It would have blown up." He testified that carbon dioxide is not flammable but that the heat of the forge would have caused the gas inside the bottle to expand, causing the bottle to explode. Inside the classroom were posters and a wood ceiling that would have been burned and damaged by a fire.

Police officer Richard Jimenez testified that on March 11, 2008, he interviewed appellant who, along with another minor, J.R.,[2] was a suspect in an incident that had occurred at a middle school. He testified that appellant was "very forth coming" and explained that he and J.R. went to school and drank beer on top of the roof outside

[2] Watrous testified he does not know appellant, but that J.R. was a student in his shop class.

Watrous's classroom. They were there for a short period of time until J.R.'s mother called at about 11 p.m. and told J.R. to come home. According to appellant, he and J.R. went to J.R.'s house, then "snuck out" once J.R.'s mother fell asleep, and went back to the school. Appellant admitted they went inside the metal shop (the classroom) when they returned to the school and that he took a key from the room.[3] He said that he and J.R. brought a carbon dioxide canister with them into the metal shop when they broke into the school and that J.R. was carrying the canister. J.R. put the canister inside the forge and turned the forge on, and they "took off running from the facility" because they thought it was going to cause an explosion. Appellant told Jimenez that he did not know J.R. was going to put the canister inside the forge and that he had no intent to "blow up the school."

Jiminez testified he went to appellant's house as part of his investigation. The key appellant admitted he had taken from the metal shop was hanging on a wall in appellant's room. Inside appellant's drawer was a carbon dioxide canister of the same make and model as the one that was found inside the forge. Jimenez also found in the back patio area of the house a case of the same type of beer appellant said he and J.R. had consumed at school the night of the incident. Jimenez testified that the canister found in the forge had a label that warned against exposing the canister to 130 degrees Fahrenheit of heat.

The juvenile court requested briefing on the issues of whether the use of the forge to cause an explosion constituted arson, and whether there was sufficient evidence to find that appellant and J.R. were "working together." After the parties submitted briefing on those issues, the juvenile court found the People did not meet the burden of proof with regard to count 1 (attempted arson) but did meet the burden of proof with regard to count 3 (burglary). The juvenile court reduced the felony burglary to a misdemeanor and placed appellant on probation subject to various terms and conditions.

## DISCUSSION

Appellant's sole contention on appeal is that there was insufficient evidence to support the juvenile court's finding that he entered the metal shop with the intent to commit arson or theft. We disagree.

[3] Watrous testified the key came from his classroom.

The required intent for a burglary is the specific intent, at the time of entry, to commit any felony or larceny. (§ 459; *People v. Carter* (2005) 36 Cal.4th 1114, 1144.) " 'Because intent is rarely susceptible to direct proof, it may be inferred from all the facts and circumstances disclosed by the evidence. [Citations.] Whether the entry was accompanied by the requisite intent is a question of fact for the [trier of fact]. [Citation.] "Where the facts and circumstances of a particular case and the conduct of the defendant reasonably indicate his purpose in entering the premises is to commit larceny or any felony, the conviction may not be disturbed on appeal." ' [Citation.]" (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1575.)

" ' "In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.]' (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for lack of substantial evidence only if ' "upon no hypothesis whatever is there sufficient substantial evidence to support" ' the conviction or the enhancement. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)" (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1508.)

There was substantial evidence to support the juvenile court's finding that appellant entered the metal shop with the intent to commit a felony or larceny. Appellant admitted he and J.R. "snuck out" of J.R.'s house after J.R.'s mother had fallen asleep. They returned to the school in the middle of the night and broke into the metal shop by climbing onto the roof and breaking a window that led to the shop. They brought a carbon dioxide canister with them into the metal shop when they broke into the school. When Jiminez searched appellant's room, he found a carbon dioxide canister of the same make and model as the one found in the forge, which strongly suggested the canister they brought into the metal shop was supplied by appellant. Appellant told Jimenez he did not know J.R. was going to put the canister inside the forge, but the circumstances showed he was aware of

and had the intent to participate in this plan, as he went to the school with J.R. and drank beer with him,[4] "snuck out" of J.R.'s house, returned to the school in the middle of the night, broke into the metal shop, likely supplied the carbon dioxide canister, which they brought with them into the shop, and fled, believing there would be an explosion. There was substantial evidence to support a finding that appellant broke into the metal shop with the intent to commit a felony, arson.[5]

Appellant argues that despite the above evidence, "the juvenile court's finding of insufficient evidence to support a finding that [appellant] intended [to] commit arson precludes the court from finding sufficient evidence of a burglary based upon the theory that [appellant] entered the school with intent to commit arson." To the extent the juvenile court's findings as to the attempted arson and burglary counts might be inconsistent, however, it is settled that " '[i]nconsistency in a verdict is not a sufficient reason for setting it aside.' " (See *People v. Palmer* (2001) 24 Cal.4th 856, 860 (*Palmer*).)[6] *Palmer* stated that many reasons, including lenience, may explain inconsistent verdicts, and held that an appellate court's review of whether there was substantial evidence to support a conviction on one count must be independent of the determination of whether evidence on another count was insufficient. (*Id.* at pp. 858, 863-865.) Here, the juvenile court, which reduced the felony burglary to a misdemeanor in part because "nothing really bad happened . . .

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[4] It is likely appellant also supplied the beer he and J.R. two drank that night, as Jimenez found the same type of beer during his search of appellant's house.

[5] "A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property." (§ 451.)

[6] We do not believe the findings are necessarily inconsistent. Unlike the general intent crime of arson, attempted arson requires a specific intent to burn. (*People v. Atkins* (2001) 25 Cal.4th 76, 87.) Further, " ' "[i]n order to establish an attempt, it must appear that the defendant had a specific intent to commit a crime *and* did a direct, unequivocal act toward that end; preparation alone is not enough, and some appreciable fragment of the crime must have been accomplished." ' [Citation.]" (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 983, emphasis added.) The juvenile court may have found that appellant had the intent to commit arson when he broke into the school but that there was insufficient evidence of a "direct, unequivocal act toward that end" for the court to make a true finding as to the attempted arson.

although it had that potential," could very well have declined to make a true finding as to the attempted arson based on lenience. Any inconsistency in the juvenile court's findings does not affect our conclusion that there was substantial evidence to support the true finding as to the burglary count.

**DISPOSITION**

The dispositional order is affirmed.

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McGuiness, P.J.

We concur:

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Siggins, J.

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Jenkins, J.